Supreme Court, U.S.
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Case No. 91-364

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL E. ARNOLD,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STEVEN TIMONERE
Doyle, Lewis & Warner
202 North Erie Street
Post Office Box 2168
Toledo, Ohio 43603
(419) 248-1500
Attorneys for Respondent

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO (513) 621-2880

QUESTIONS PRESENTED

1. Whether the United States District Court and the Sixth Circuit Court of Appeals properly found that petitioner fell within the "situs" requirement of the Longshore and Harbor Workers' Compensation Act, 33 *U.S.C.* 901 *et seq.*, where the petitioner's injuries occurred approximately 2,000 yards from the waterfront but in an area customarily used by the employer in loading and unloading a vessel.

2. Whether the United States District Court and the Sixth Circuit Court of Appeals properly found that petitioner satisfied the "status" requirement of the Longshore and Harbor Workers' Compensation Act, 33 *U.S.C.* 901 *et seq.*, in that petitioners' activities on April 21, 1988 consisted of repairing equipment essential to the loading and unloading process at the Presque Isle/Lakefront Dock facility.

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STATEMENT OF THE CASE

In 1988, petitioner Paul E. Arnold, was employed by respondent Consolidated Rail Corporation (Conrail) as a mechanic. During the year, petitioner was assigned to the Presque Isle/Lakefront Docks facility located in Toledo, Lucas County, Ohio pursuant to the Toledo Docks Operating Agreement (TDOA). The TDOA is an agreement between various railroad companies, including Conrail, and the Lakefront Dock Company regarding the operation and maintenance of the rail and dock facilities contained within Presque Isle/Lakefront Docks. The TDOA provides that the Presque Isle/Lakefront Docks facility would be managed as a combined coal and ore facility under the direction of the Chesapeake and Ohio Railroad Company. The Presque Isle/

Lakefront Docks facility handles coal from rail cars into Great Lakes' vessels and unloads ore from vessels into rail cars for shipment to steel mills.

On April 21, 1988, petitioner inspected Locomotive No. 7800 at the direction of supervisory personnel stationed at Presque Isle. Locomotive No. 7800 was owned by the Toledo Ore Railroad Company (TORCO) which is a wholly-owned subsidiary of CSX Transportation. TORCO Locomotive No. 7800 is operated exclusively within the Presque Isle/Lakefront Docks facility and is used to move rail cars into and out of the "load-out" station at Presque Isle.

While engaged in repair work on the locomotive, appellant was injured while trying to release a stubborn brake shoe from the brake assembly. At the time of petitioner's injuries, the brake shoe of TORCO Locomotive No. 7800 was so in need in repair as to constitute a "federal defect" under the Federal Railway Administration. Thus, as Locomotive No. 7800 contained a federal defect, the locomotive could not legally be used until the defect was corrected. Appellant was not on the waterfront when injured, but instead, was located approximately 2,000 yards from the waterfront on a section of TORCO railroad track within the Presque Isle/Lakefront Docks facility.

Petitioner brought an action against Conrail pursuant to the Federal Employers' Liability Act (FELA) 45 *U.S.C* § 51 *et seq*. Conrail filed a motion to dismiss petitioner's FELA action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Conrail asserted that petitioner's injuries were within the exclusive jurisdiction of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 *U.S.C.* § 901 *et seq*. and, as the LHWCA constituted petitioner's sole remedy for his injuries of April 21, 1988, the District Court had no subject matter jurisdiction to hear petitioner's FELA claim. The District Court found that petitioner satisfied the requisite situs and status tests for LHWCA coverage, found that LHWCA provided petitioner's exclusive remedy for his work-

related injuries, and dismissed his FELA action. The District Court's decision was affirmed by the Sixth Circuit Court of Appeals.

Petitioner insists that the LHWCA is not applicable to the injuries he sustained on April 21, 1988, and that his FELA complaint should not have been dismissed. It is petitioner's position that neither the situs nor status tests required for coverage under the LHWCA were satisfied. Petitioner argues that his injuries occurred outside of the parameters of the situs test, set forth in 33 *U.S.C.* § 903(a), in that petitioner alleges that his injury did not occur in an area which is part of the loading and unloading operations of the Presque Isle/Lakefront Docks facility. Petitioner also alleges that the status requirement was not satisfied in that petitioner's activities on the date in question were not an essential part of the loading or unloading process at the Presque Isle/Lakefront Docks facility. Petitioner insists that this Court has the "unique opportunity to provide direction to and chart a clear path for injured railroad workers by defining the application of the LHWCA vis a vis the FELA." *Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*, p. 15.

As will be established below, the District Court properly found that petitioner fell within the expansive coverage of the LHWCA and properly dismissed his FELA claim. The District Court followed this Court's most recent decision regarding the LHWCA and FELA, in *Chesapeake and Ohio Railway Co.* v. *Schwalb*, 493 U.S. 40 (1989), when it found that the situs and status tests were satisfied, and accordingly, that the LHWCA provided petitioner's exclusive remedy for the injuries sustained on April 21, 1988. The District Court properly found that the situs at issue, a section of TORCO railroad track, was an adjoining area customarily used in loading or unloading a vessel. The District Court was also correct in its finding that petitioner's activities on the date in question, repair and maintenance of a TORCO locomotive,

were essential to the loading and unloading process at the Presque Isle/Lakefront Docks facility, as required in *Schwalb*, *supra*, and that petitioner's repair and maintenance work met the status test for LHWCA coverage.

Petitioner has failed to set forth "special and important reasons," required by Rule 10 of the Rules of the United States Supreme Court, why this Court should review the dismissal of petitioner's FELA complaint. This case presents no substantial constitutional question nor does this case present a special or important principle or rule of law so as to justify review by this court. The District Court's decision, with its subsequent affirmance by the Sixth Circuit Court of Appeals, is not in conflict with a decision of any other United States Court of Appeals on this matter. The District Court's Decision is consistent with federal precedent, in particular, *Schwalb*, *supra*, and thus, the Courts below have not departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Accordingly, pursuant to Supreme Court Rule 10, a petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is not well-taken and for the reasons which follow, should be denied.

ARGUMENT

A. Situs requirement of the LHWCA.

The parties agree that, if the LHWCA applies, it provides the exclusive remedy for the injuries petitioner sustained on April 21, 1988 and the District Court properly dismissed the FELA complaint. *See, Kelley* v. *Pittsburgh Conneaut Dock*, 900 F.2d 89 (6th Cir. 1990). The parties also agree that, for the LHWCA to apply, the situs and status tests must be satisfied. *Chesapeake and Ohio Railway Co.* v. *Schwalb*, 493 U.S. 40 (1989). For the situs test to be satisfied, the injury must have occurred:

> "Upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

33 U.S.C. § 903(a); *Schwalb*, 493 U.S. at 46. The situs and status requirements should be interpreted broadly with a view towards extended coverage of the LHWCA. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977).

As noted by the District Court, the situs requirement is a functional one; is the situs used as a part of the loading and unloading operations? *Merrill* v. *Chicago and Illinois Midland Railway Co.*, 751 F.Supp. 770 (C.D. Ill. 1990).

In this case, the situs in question is a section of TORCO railroad track which contained TORCO Locomotive No. 7800. As noted earlier, TORCO Locomotive No. 7800 is operated exclusively within the Presque Isle/Lakefront Docks facility and is used to move rail cars to be loaded with coal or ore at the "load-out" station.

There is indeed ample precedent for the determination that the section of TORCO railroad track is part of loading and unloading operations of the Presque Isle/Lakefront Docks facility. *Voglesang* v. *Western Maryland Railway Co.*, 670 F.2d 1347 (4th Cir. 1982) (LHWCA covered employee in-

jured while atop railroad car located on defendant's railroad tracks); *Cargill Inc.* v. *Powell*, 573 F.2d 561, 561-63 (9th Cir. 1977) (status requirement satisfied where grain facility worker injured while operating a "tipper" which was used to unload railroad cars). *Merrill*, 751 F.Supp. at 775 (railroad worker within LHWCA coverage where he was injured on railroad tracks leading away from the dump house; *Conligio* v. *Norfolk and Western Railway Co.*, 670 F.Supp. 1353 (E.D. Mich. 1987) (defendant's east-bound railroad yard, which contained rail cars destined for shipment to Canada, satisfied the expansive view of LHWCA coverage under the status test).

Petitioner argues, that since his injuries occurred approximately 2,000 yards from the waterfront, his injuries are not within the geographical parameters set forth in 33 U.S.C. § 903(a). This argument is without merit. It is well-established that distance from the water itself is not determinative of LHWCA coverage. *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 136 (9th Cir. 1978) (employee injured at a gear locker located approximately 2,600 feet from the waters' edge within LHWCA coverage). *Dravo Corp.* v. *Maxin*, 545 F.2d 374 (3d Cir. 1976) (shipbuilder's structural shop located some 2,000 feet from navigable channel is within LHWCA coverage). In the present case, the fact that petitioner's injuries occurred approximately 2,000 yards from the waterfront does not remove said injuries from LHWCA coverage.

Petitioner also contends that the District Court erred when it stated that petitioner's injury occurred on a "marine railway" and thus, satisfied the situs requirement. This error is of no consequence. The parties agree that petitioner's injuries did not occur on a marine railway. Instead, respondent submits that petitioner injuries occurred within an "adjoining area customarily used . . . in loading . . . (or) unloading . . . a vessel." 33 *U.S.C.* § 903(a). An injury sustained in this area is within LHWCA coverage and the Sixth Circuit Court of Appeals noted that, "even if the railroad tracks on which

plaintiff (petitioner) worked were not a 'marine railway,' the finding that they were inside the dock facility area which adjoins navigable waters was sufficient to meet the situs requirement." *Arnold* v. *Consolidated Rail Corp.*, No. 90-3835 slip op. (6th Cir. June 6, 1991) (per curium). The parties do not dispute that petitioner was injured on a section of TORCO railroad track contained within the Presque Isle/Lakefront Docks facility. In light of *Vogelsang, supra*, *Merrill, supra*, and *Conligio, supra*, and the liberal construction of the situs requirement of the LHWCA, the District Court properly found that the section of railroad track at issue was used in loading/unloading operations at the Presque Isle/Lakefront Docks facility and thus, met the situs requirement for LHWCA coverage.

B. Status requirement for LHWCA coverage.

The status requirement for LHWCA coverage is set forth in 33 *U.S.C.* § 902(3). Section 902(3) states:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker including the ship repairman, ship builders, and ship breaker . . ."

In analyzing whether an employee falls within § 902(3), the United States Supreme Court has employed the "essential to the loading or unloading process" test. *Schwalb*, 493 U.S. at 47. Thus, petitioner's activities on April 21, 1988 (repairing or maintaining a TORCO locomotive) are within LHWCA coverage if they are found to be essential to the loading and unloading process of the Presque Isle/Lakefront Docks facility. *Id.*

In *Schwalb*, the Supreme Court found that employees who repair or maintain equipment essential to the loading and unloading process are covered by the LHWCA. *Id.* The Supreme Court held that it makes no difference that the par-

ticular kind of repair work being performed might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded. *Id.* The court also held that routine maintenance work was also within LHWCA coverage. The Court stated "someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment." *Id.*

Petitioner argues that he was performing traditional railroad work at the time of his injuries and pursuant to union contract, only a railroad employee could have performed the repair work at issue. This argument is without merit. It is well-established that railroad workers working dock-side, performing traditional railroad work, may be covered by the LHWCA. *Schwalb*, 493 U.S. at 46-47. *Harmon* v. *Baltimore and Ohio Railroad Co.*, 741 F.2d 1398 (D.C. Cir. 1984) (railroad employee injured while repairing a coal hopper covered by LHWCA); *Price* v. *Norfolk and Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980) (railroad employee injured while painting structure found within LHWCA coverage); *Conligio*, 670 F.Supp. at 1355 (railroad engineer's task of "making up trains" constituted maritime employment within LHWCA coverage).

Petitioner also argues that, because the loading and unloading process was not halted at the precise moment of appellant's injuries, then the repair and/or maintenance work performed on TORCO Locomotive No. 7800 was not then essential to the loading or unloading process of the Presque Isle/Lakefront Docks facility. This argument is also without merit. It is well-established that, to satisfy the essential to the loading and unloading test, respondent need only to show that, without the particular work, the loading and/or unloading process would at some future time, cease. *Schwalb*, 493 U.S. at 50; *Graziano* v. *General Dynamic Corp.*, 663 F.2d 340 (1st Cir. 1981) (even though shipbuilding process of company would not have come to an immediate halt if employee's duties were not specifically

discharged, failure to perform routine maintenance would have lead to stoppage or curtailment of shipbuilding; thus, employee's duties mandated his coverage under LHWCA); *Price* v. *Norfolk and Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980) (railroad employee injured while painting structure which was essential to the loading and unloading of maritime cargo was covered by LHWCA; even though the loading process would not stop immediately if the structure was not painted, the failure to paint would eventually lead to severe rusting that would halt the entire process). Thus, the District Court properly made the common sense determination that, without repair or maintenance work on TORCO locomotives, eventually the loading and unloading process, which is brought about by TORCO locomotives on TORCO railroad track within the Presque Isle/Lakefront Docks facility, would cease.

Other courts have construed the Supreme Court's decision in *Schwalb* consistent with the Court below. *Atlantic Container Service, Inc.* v. *Coleman*, 904 F.2d 611 (11th Cir. 1990) (land-based work of a mechanic, which consisted almost entirely of making out-bound loaded chassis "roadworthy," was an essential part of the loading or unloading process); *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991) (driver of "yard hustler" used to transport cargo containers between stevedoring business' dockside storage facility and carrier's port district rail facility satisfied status test). Accordingly, the District Court's finding that petitioner who was injured while repairing a locomotive used exclusively for the transportation of rail cars to the load out station of the Presque Isle/Lakefront Docks facility satisfied the status test for LHWCA coverage was proper, considering *Schwalb* and other federal precedent.

C. Considerations governing review on writ of certiorari.

As provided in Rule 10 of the Rules of the Supreme Court of the United States, a review on writ of certiorari is not a

matter of right, but instead, of judicial discretion. In addition, the Court will hear a case upon a writ of certiorari only when the petitioner sets forth "special and important reasons therefore." In the present case, petitioner has not shown such special and important reasons for a review of this case by the United States Supreme Court, and accordingly, the petition for writ of certiorari must be denied.

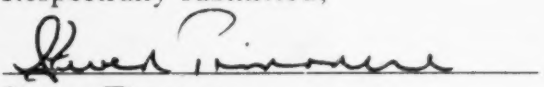
The Sixth Circuit Court of Appeal's decision affirming the District Court's decision which found that petitioner was within the LHWCA coverage on April 21, 1988, is not in conflict with any reported decision of another United States Court of Appeals on this issue. Nor is the Sixth Circuit's decision in conflict with any state court decision regarding railroad workers and the LHWCA. In addition, the Sixth Circuit's decision has not departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Instead, the Sixth Circuit's decision is consistent with the well-established precedent of the LHWCA including *Schwalb*, *supra*. This case presents no substantial constitutional question, no principle, no rule of law which has not been many times reviewed and adjudicated by this Court. Nor does this case represent any matter of great interest or concern except to the petitioner, who is dissatisfied with the decisions rendered below. On that basis, petitioner has not demonstrated that "special and important reasons" are present which require this Court to exercise its discretion and accept this case for review.

CONCLUSION

The decision of the District Court which found that petitioner was within the LHWCA and that decision's affirmance by the Sixth Circuit Court of Appeals is consistent with this Court's decision in *Schwalb* and with other fereral courts which have interpreted the LHWCA. Petitioner satisfied the situs and status tests required for LHWCA coverage, the LHWCA provided petitioner's exclusive remedy for the injuries he sustained on April 21, 1988, and the District Court properly dismissed petitioner's FELA claim.

In addition, petitioner has not shown that special and important reasons exist for this Court to exercise its discretion and review the District Court's decision to dismiss petitioner's FELA claim. Petitioner has shown no conflict between the decisions below and other federal or state court decisions regarding LHWCA coverage. Nor has petitioner shown that the opinions below have departed from prior LHWCA precedent. For those reasons, respondent respectfully requests that the Court deny the petition for writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,



Steven Timonere
Doyle, Lewis & Warner
Attorneys for Respondent

APPENDIX

RULE OF THE SUPREME COURT

PART III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right but of judical discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.